Ah Chu Company and Department Store Employees Union, Local 1100, affiliated with United Food and Commercial Workers International Union, AFL-CIO. Case 20-CA-15425

November 6, 1981

# **DECISION AND ORDER**

# By Members Fanning, Jenkins, and Zimmerman

On June 15, 1981, Administrative Law Judge Gordon J. Myatt issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

# ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Ah Chu Company, San Francisco, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

Volume Merchandise purchased the Mission Street store from Don Kurtz, and leased the sundry department to Kurtz in late 1978 or early 1979. (The Administrative Law Judge erroneously stated this date as January 1980.) Volume Merchandise and the Union then entered into the collective-bargaining agreement that specifically excluded the sundry department employees from the bargaining unit, as mentioned above. Instead, these employees became part of the unit located at the Geary Boulevard store, which Kurtz still owned, and were covered by the collective-bargaining agreement between the Union and the Geary Boulevard store. In May 1980, Kurtz sold the lease for the sundry department to Respondent. Both pharmacy employees and sundry department employees at the Mission Street store then worked for Respondent.

In finding that the Mission Street store sundry department employees form an appropriate unit in and of themselves, we rely upon Stroehmann Brothers Company, 252 NLRB 988 (1980), enfd. in an unpublished opinion 108 LRRM 2280 (3d Cir. 1981). In that case, Ward Foods, Inc., the predecessor employer, operated a bakery and distribution facility in which there were two units of employees. One unit consisted of route salesmen, over-the-road drivers, and mechanics, and the other unit contained production, maintenance, and shipping employees. Shortly before it sold the facility, Ward ceased production, laid off its production employees, and operated only as a distribution center. We found that a unit of shipping employees was appropriate essentially because they had been represented separately and apart from the employees in the other bargaining unit, albeit the shipping employees had been part of a larger unit. Here, the sundry department employees too had been part of a larger bargaining unit. They have never been part of a unit that included pharmacy employees. Indeed, the pharmacy employees have always been a unit by themselves, represented by a different local, Local 648. In light of the separate representation of the pharmacy employees on one hand and the sundry department employees on the other, the unit of sundry department employees is appropriate because another union has represented those employees (though in a larger unit), and because "it may reasonably be assumed that, as a result of transitional changes, the employees' desires concerning unionization [have not] likely changed." Id. at 989, citing Mondovi Foods Corporation, 235 NLRB 1080, 1082 (1978).

<sup>3</sup> Member Jenkins would award interest on backpay in accordance with the formula set forth in his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

<sup>&</sup>lt;sup>1</sup> Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. Standard Dry Wall Products, Inc., 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

<sup>&</sup>lt;sup>2</sup> We agree with the Administrative Law Judge's finding that a unit limited to sundry department employees at the Mission Street store is appropriate. We do not agree, however, with his rationale, nor do we think that the cases he cited, such as Zim's Foodliner, Inc. d/b/a Zim's IGA Foodliner, et al. v. N.L.R.B., 495 F.2d 1131 (7th Cir.), cert. denied 419 U.S. 838 (1974), enfg. 201 NLRB 449 (1973), are apposite. In those cases, the Board found that a unit limited to a single facility was appropriate when that facility was sold or otherwise separated from a multifacility bargaining unit.

The 1978-81 collective-bargaining agreement between the Union and Volume Merchandise excludes pharmacy employees and sundry department employees from its coverage. The pharmacy employees historically have been represented by Local 648 of the same International Union, and this Local represented those employees when Respondent acquired the lease for the pharmacy department in April 1978. Local 648 initially requested that Respondent recognize it as the bargaining representative of the pharmacy employees, but soon dropped its demand for recognition.

## **APPENDIX**

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT discourage membership in Department Store Employees Union, Local 1100, affiliated with United Food and Commercial Workers Union, AFL-CIO, or any other labor organization, by refusing to hire employees who are members of that union, or any other labor organization, and thereby discriminate against employees or applicants for employment in regard to hire and tenure of employment.

WE WILL NOT refuse to recognize and bargain collectively with Local 1100 as the exclusive bargaining representative of our employees in the following appropriate unit:

All employees performing selling and nonselling work in the sundry department operated at 2558 Mission Street, San Francisco, California; excluding all other employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL recognize and bargain, upon request, with the above-named Union as exclusive bargaining representative of our employees in the unit found appropriate.

WE WILL offer immediate and full employment to Alice Dominici, Lucilla Edison, and Susanna Lopez without prejudice to their seniority or other rights and privileges, discharging if necessary any employees hired since we took over the operation of the sundry department at the Mission Street store, and WE WILL make them whole for any loss of pay, plus interest, they may have suffered as a result of our discrimination against them.

## AH CHU COMPANY

## **DECISION**

## STATEMENT OF THE CASE

GORDON J. MYATT, Administrative Law Judge: Upon a charge filed by Department Store Employees Union, Local 1100, affiliated with United Food and Commercial Workers International Union, AFL-CIO (hereafter called the Union), on June 13, 1980, and an amended charge filed on July 30 against Ah Chu Company (hereafter called the Respondent), the Regional Director for Region 20 issued a complaint and notice of hearing on August 29.2 In essence, the complaint alleges that the Respondent purchased the lease of the sundry department of a discount store operation from an owner whose employees were represented by the Union and covered by a collective-bargaining agreement. Further, that after the purchase, the Respondent unlawfully refused to hire the employees of the previous owner and unlawfully refused to recognize the Union as the exclusive bargaining representative of the employees in the leased department. In addition, it is asserted that the Respondent refused to adhere to the terms and conditions of the existing collective-bargaining agreement covering these unit employees. The complaint asserts that by this conduct the Respondent has violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended, 29 U.S.C. 151, et seq. (hereafter called the Act). The Respondent filed an answer which admits certain allegations of the complaint, denies others, and specifically denies the commission of any unfair labor practices.

A hearing was held in this matter on February 3, 1981, in San Francisco, California. All parties were represented by counsel and afforded full opportunity to examine and cross-examine witnesses and present material and relevant evidence on the issues. Briefs were submitted by all parties and have been duly considered.

On the entire record in this case, including my observation of the witnesses and their demeanor while testifying, I make the following:

## FINDINGS OF FACT

## I. JURISDICTION

Ah Chu Company, Respondent herein, is a sole proprietorship with its office and place of business located in San Francisco, California. The Respondent is an enterprise engaged in the sale of retail drugs and sundry products. During the calendar year ending December 31, 1979, the Respondent, in the course of its business operations, derived gross revenues in excess of \$500,000. During a similar period, the Respondent purchased and

<sup>&</sup>lt;sup>1</sup> The name of the Union appears as amended at the hearing.

<sup>&</sup>lt;sup>2</sup> Unless otherwise indicated, all dates herein refer to the year 1980.

received at its San Francisco facility products, goods, and materials valued in excess of \$50,000 directly from points outside the State of California. Based on the above, I find that the Respondent is, and has been at all times material herein, an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

#### II. THE LABOR ORGANIZATION INVOLVED

Department Store Employees Union, Local 1100, affiliated with United Food and Commercial Workers International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

## III. THE ALLEGED UNFAIR LABOR PRACTICES

# A. Background Facts

The discount store in which the Respondent purchased the lease operation of the sundry department was one of three such stores in San Francisco. One store was located on Alemany Boulevard, another on Mission Street, and the third on Geary Boulevard. These stores have a long history of changes in ownership over a period of years. However, the employees of the various leased departments have traditionally been represented by the Union with the exception of the pharmacy and shoe department employees. The employees in these latter departments were traditionally represented by different locals of the same International Union.

Some time in 1976 or 1977 (the exact date is not clear in the record), the three stores were owned by Payless Drug Stores Northwest, Inc., and operated under the name of Value Giant. Don Kurtz then purchased the Alemany Boulevard store from Payless within the same time frame and changed the name of that store to Giant Value. When Kurtz purchased the Alemany Boulevard store, he negotiated a contract with the Union covering the employees of the various leased departments except those under the jurisdiction of sister locals. At some unspecified date in 1977, Kurtz then purchased both the Mission Street and Geary Boulevard stores from Payless. A separate collective-bargaining agreement was negotiated with the Union covering the employees at these latter two stores for the period beginning August 1, 1977, and ending July 31, 1978. (G.C. Exh. 2.) By its terms, this contract lumped the employees at the Geary and Mission stores into a single bargaining unit as distinguished from the bargaining unit at the Alemany store.3 However, the two contracts (Alemany and Geary-Mission) were identical in their substantive terms.

In April 1978, the Respondent purchased the leases for the pharmacy concessions from Kurtz at all three stores. Local 648 of the same International Union represented the pharmacy employees of the Respondent's predecessor at these stores. This local requested that the Respondent recognize it as the exclusive bargaining representative for the pharmacy employees after the Respondent took over the leases. Edwin Chu, owner of the Respondent, referred the union representatives to his labor

consultant, Tyrone Cochran. Unrefuted testimony by Cochran discloses that, after he consulted with the representatives of Local 648, that Union no longer manifested an interest in representing the Respondent's pharmacy employees and dropped its demand for recognition.

# B. The Respondent's Takeover of the Sundry Department at the Mission Street Store

Sometime in late 1978, Kurtz began to run into financial difficulties with the operation of the stores. In January 1980, Kurtz sold the Mission store to Volume Merchandise, who was a lessee of Kurtz at that particular facility. As part of the arrangement, Kurtz retained operation of the sundry department as a lessee of Volume. A new contract was negotiated between the Union and Volume for the Mission store employees coming within the Union's jurisdiction. (Resp. Exh. 1.) Although the employees working in the sundry department, now leased by Kurtz, would have normally been covered by this aggrement, the Union and Volume attached a provision, by way of an appendix to the contract, specifically excluding these employees and making them a part of the unit with the Geary store of Kurtz.

LaVere "Moe" Heilesen, business representative of the Union, testified that under the terms of the agreement with Volume, the Union considered the seniority rights and the payroll coverage of the sundry department employees to be combined with that of the Giant Value Geary store employees. But for all other purposes, according to Heilesen, the employees were covered under the Volume Merchandise contract, which the Union considered to be the master agreement. Ray Vetterlein, a labor consultant who represented Kurtz in all of his transactions involving the Giant Value stores, stated that he was confronted with a complex bargaining problem because Volume did not want to assume Kurtz' layoff list for the sundry department employees. Therefore, according to Vetterlein, he negotiated with the Union to get a separate agreement for Volume which specifically excluded the employees of the sundry department. Vetterlein stated the sundry department employees were

<sup>&</sup>lt;sup>3</sup> Thus, the employees at the Geary and Mission stores shared seniority and layoff and recall rights.

<sup>&</sup>lt;sup>4</sup> The provision in the contract between the Union and Volume relating to leased departments is as follows:

Section 21. Leased Departments.

A. The Employer agrees that any employees performing work covered by this Agreement in leased or licensed departments, under subcontract or as demonstrators, shall be members of the Collective Bargaining that as defined in this Agreement, and the Employer agrees to retain and exercise full control over all of the terms and conditions of employment of all such employees.

B. It is recognized by the Union that the terms of the Employer's lease or license arrangements obligate the lessee or licensee to pay the wages and observe the other terms of this Agreement, and the Union agrees that the Employer is entitled to place the financial responsibility for meeting the cost of observance of this Agreement upon said lessees and/or licensees.

<sup>&</sup>lt;sup>5</sup> The provision in the appendix to the contract between the Union and Volume affecting the employees of the sundry department reads as follows:

<sup>5.</sup> Sundry Department Employees:

Irrespective of the terms of Section 21 of this Agreement all Sundry Department employees shall be covered by and part of the d.b.a. by and between Giant Value 5250 Geary Boulevard, San Francisco, California, and Local 1100.

made an "adjunct" to the Geary store unit and they were covered under the Geary contract. He further testified this modification (sec. 5 of the appendix to the contract) was put into the agreement specifically at the Union's request in order to protect the seniority and layoff rights of the sundry department employees.

Kurtz continued to experience financial problems and, several months prior to June, entered into negotiations with Volume and the Respondent to have the Respondent purchase the lease for the sundry department as well as a liquor license held by Kurtz at the Mission store. These arrangements were finalized on May 8 and the Respondent was to take over operation of the sundry department at Mission Street on June 1. (Resp. Exhs. 4 and 5.)<sup>6</sup>

During the time Kurtz leased the sundry department at the Mission Street store, Robert McGrath was the manager and Ellen Wentworth was the assistant manager. In addition, six employees worked in the department and were part of the bargaining unit. These employees were: Alice Dominici, Lucilla Edison, Sara Gilbert, Gee Gwing Hung, Susanna Lopez, and Euwanda Sexton.

Although Kurtz and the Respondent attempted to keep their negotiations private, the unit employees quickly gained knowledge of the pending change in ownership of the lease. Dominici worked in the department as a cashier and stock clerk. She testified that at least 2 months prior to the Respondent taking over the lease, she spoke with McGrath about the employment prospects for the employees after the lease was transferred. According to Dominici, McGrath stated he had talked with Chu and the employees would be retained. On May 30, Dominici again spoke to McGrath about the employees' fate after the Respondent took over the department. She stated McGrath said Chu wanted to keep the employees. Dominici insisted she wanted to hear this directly from Chu and she went to speak with him in the pharmacy. According to Dominici, Chu said he wanted to keep the employees but was having problems between Local 648, a union he wanted, and Local 1100, which currently represented the employees. She stated Chu advised her to take a week off and fill out an application for employment. He told the employee that McGrath would contact her.7 Dominici said Chu indicated he could not say much more at that time because it would create further problems for him.

Dominici testified that her last day of work in the sundry department was May 31. She was never contacted by McGrath but returned to the store sometime between June 16 and June 20. While there, she spoke with McGrath and commented that it did not seem as if the employees would be getting their jobs back. According to Dominici, McGrath replied that he did not know because "things were pretty lousy."

Edison worked in the camera section of the sundry department. She was classified as a department head and under the contract received a higher wage rate than the regular sales employees. She testified that, approximately 2 months before the Respondent took over the department, she questioned McGrath about her future employment. According to Edison, McGrath stated that Chu was going to keep her along with Dominici and Lopez. Since she knew Chu, Edison went directly to him to inquire about her job prospects under the new management. Edison testified Chu said he was not sure of the arrangements at that time. He indicated he wanted to retain Edison, but was having problems. On cross-examination, Edison acknowledged that she told Chu she had a job offer from a pharmacy in the area called "Joe's Pharmacy." She stated, however, that in her conversation with Chu she did not indicate she was going to accept the pharmacy job.

Edison further testified that she had another conversation with Chu on May 30. She said Chu informed her that he still wanted her to take over the camera section of the sundry department, but he was having trouble with the Union. According to Edison, Chu said he wanted to drop Local 1100 and get Local 648 to represent the employees. As in the case of Dominici, Chu advised Edison to take a week off and he would contact her about the job. Edison testified that during this conversation Chu asked if she would be willing to join Local 648 and give up her membership in Local 1100. Edison replied that it depended on her position with the Respondent and the money arrangements. After the transfer of the lease from Kurtz to the Respondent, Edison was not hired by the Respondent.

Lopez worked as a cashier and a sales clerk in the Mission store during Kurtz' operation of the sundry department. She testified that approximately 3 weeks before the change in ownership, she asked McGrath about her employment situation under the new management. She asked McGrath if the employees would keep their jobs and was told they would. Lopez posed the same question to McGrath the following week. According to her testimony, McGrath stated he had spoken to Chu and that the Respondent intended to retain the employees after the transfer of ownership. Lopez' last day in the department was May 30. She stated she asked McGrath what she was supposed to do (about her future employment by the Respondent). McGrath replied, according to Lopez, that the employee should wait a few days and she would be contacted. However, Lopez was never called by the Respondent.

McGrath was called as a witness in the case. He stated that, after Kurtz and the Respondent agreed to the terms of sale of the lease, it became common knowledge among the employees that Chu was taking over the operation of the department. He stated he was questioned on numerous occasions by Dominici, Edison, and Lopez about what would happen to the employees' jobs. Each time he was questioned by the employees, McGrath stated he told them the Respondent wanted to keep all of the employees but did not know whom he would retain.

<sup>&</sup>lt;sup>6</sup> Under the terms of the agreement between the Respondent and Kurtz, the Respondent purchased all of the inventory and fixtures in the sundry and liquor departments as well as Kurtz' liquor license.

<sup>&</sup>lt;sup>7</sup> McGrath had accepted an offer from Chu 3 weeks previously to remain as manager of the sundry department after the transfer of the

<sup>&</sup>lt;sup>8</sup> According to McGrath, Sexton was on disability at the time of the sale of the lease, Gilbert indicated she wanted to retire, and Gwing Hung decided to transfer to the Geary store.

He advised the employees to fill out a new application for employment with the Respondent.

Because of the anxiety expressed by the employees, McGrath said he urged Kurtz during the transition period to issue a statement to them explaining their job rights. On May 19, Kurtz had McGrath and Wentworth circulate a memorandum to the employees stating that those employees with high enough seniority could elect to transfer to the Geary store. (Resp. Exh. 3.)<sup>9</sup> The employees were given until May 29 to make this election. All employees choosing to remain at the Mission store were to be scheduled to work through May 26, but would be paid through May 29.

On May 23, Kurtz issued another memorandum to the employees indicating that the inventory and transfer date had been changed to May 29. According to this memorandum all employees were to be terminated on May 28 and Gee (Gwing Hung) and Edison were eligible to transfer to the Geary store. <sup>10</sup> He cautioned there was no guarantee of employment by the new owner. (Resp. Exh. 2.)

Chu testified that the Respondent actually took over the lease on June 1 and the department was closed May 31 in order to take inventory. He stated that when the Respondent assumed operation of the sundry department, he transferred employees in from his other pharmacies to staff the department. Chu acknowledged that he spoke with Dominici and Edison regarding their chances of being employed by him once he took over the management of the department. According to Chu, he told Dominici that he did not know what his labor situation was going to be but she would have to reapply for employment. He further stated he advised Dominici he had enough help, and it would take a month or so to see if there would be any openings.

Chu admitted that when he spoke with Edison, he was rather evasive. He testified this was due to the fact that he felt the employees would come under the jurisdiction of Local 648 rather than Local 1100.<sup>11</sup> Chu further testified that when Edison informed him of the job offer she had from Joe's Pharmacy, he became curious about the procedure for employees transferring from Local 1100 to Local 648. Therefore, he asked Edison about making such a transfer and she indicated she would find out and advise him.

Regarding McGrath's purported offers of employment to the employees, Chu denied that he ever authorized McGrath to tell the employees they would be hired by the new management. Chu stated he told McGrath to inform the employees, when asked about jobs, that he simply did not know what the situation would be.

Sometime in July, Heilesen came into the store and was introduced to Chu by McGrath. According to Chu's testimony, Heilesen stated that the Respondent would have to hire all of the former employees back and ex-

<sup>9</sup> Only three employees had enough seniority to qualify to make the transfer. They were Edison, Gwing Hung, and Gilbert.

ecute a contract with the Union. Heilesen told Chu that if he did not do this, Volume would close down the sundry department. Chu referred Heilesen to Tyrone Cochran, his labor consultant, and offered to give Heilesen Cochran's telephone number. Chu stated that Heilesen indicated he knew Cochran and would get in touch with him.

Vetterlein testified that after the deal was consummated between Kurtz and the Respondent, he had many conversations with union representatives about the fate of Kurtz' former employees. According to Vetterlein, the Union threatened to picket Volume to force Chu to hire Kurtz' employees in the sundry department. He stated that the Union took the position that Volume had the contract which covered these employees at the Mission store, and the Union intended to picket in order to force Volume to compel Chu to hire the employees and execute an agreement with the Union. Vetterlein testified that he urged the Union to use the transfer rights in the agreement covering the sundry department employees at the Mission and the Geary stores. He stated, however, that the Union rejected this suggestion because it wanted Chu to pick up the employees laid off at Mission.

Cochran testified that in late May Chu informed him of the arrangement he had made with Kurtz to acquire operation of the sundry department. Cochran stated he felt that, because Chu had the pharmacies at the various Giant Value stores, Local 648 would seek to assert jurisdiction over the sundry department employees at Mission. Cochran stated that this was his belief even though he was aware that in the San Francisco area Local 648 covered pharmacy employees and Local 1100 covered sundry department employees in discount operations when located in the same building. When contacted by the Respondent's attorney during the negotiations for the purchase of the lease, Cochran testified he informed the attorney that the Respondent did not have to keep the employees of the prior owner of the lease. He told the attorney that, if the Respondent did keep the employees, he would have to pay the higher wage rates called for in the collective-bargaining agreement with the Union. Cochran further testified that after Heilesen contacted Chu he placed a call to Heilesen but was never able to get him nor were his calls ever returned by the union representative.

## Concluding Findings

The General Counsel and the Charging Party argue that the Respondent is the successor employer to Kurtz in the operation of the sundry department at the Mission store. As such, it is contended that the Respondent refused to hire the employees of its predecessor because of their union affiliation and thus avoid having to bargain with the Union as the exclusive representative of these employees. 12

<sup>&</sup>lt;sup>10</sup> Gwing Hung transferred to the Geary store. Edison testified she did not elect to transfer because there were no openings at that store for a department head. Therefore, if she opted to transfer, she would have to work at a reduced wage rate.

<sup>&</sup>lt;sup>11</sup> Chu indicated this was his belief even though none of the employees at his pharmacies were represented by Local 648.

<sup>12</sup> The complaint alleges that the appropriate bargaining unit is: All employees performing selling and non-selling work in the sundry department operated by Respondent at 2558 Mission Street, San Francisco, California; excluding all other employees, guards and supervisors as defined in the Act.

The Respondent, on the other hand, contends that the bargaining unit is not that urged by the General Counsel or the Union. Respondent states that prior to the sale of the lease, the sundry department employees were specifically made a part of the Geary bargaining unit, and after the sale the unit at the Mission store became a part of the Respondent's pharmacy department. In addition, the Respondent argues that it is not a successor to Kurtz and therefore under no duty to bargain with the Union. The Respondent contends that the sundry department employees were either terminated, placed on layoff, or transferred by Kurtz to the Geary store at the termination of his lease. Respondent further contends that as the new owner of the lease it was under no obligation to employ the individuals working for Kurtz nor did it refuse to employ them because they were members of the Union.

I find that the Respondent's first argument—that a unit limited to sundry department employees at the Mission store is not an appropriate one—is without merit. Although the Respondent's position on this point is not articulated in precisely these terms, it in effect states that the continuity of the bargaining unit was destroyed when the Respondent took over the ownership of the lease at the Mission store. To support this position, Respondent relies on the collective-bargaining agreement between Giant Value and the Union, which placed the Mission and Geary stores in a single bargaining unit and the subcollective-bargaining agreement between Volume and the Union, which specifically retained the sundry department employees of the Mission store in the Geary unit. Thus, according to the Respondent's argument, its purchase of the lease at Mission caused a severance from the prior unit and the sundry department became merged with the Respondent's pharmacy department at that store.

While this argument contains some elements of persuasiveness, it overlooks the fact that the Board has consistently held, with court approval, that a much reduced bargaining unit may be treated as a miniature of the predecessor's larger unit. See, e.g., Nazareth Regional High School v. N.L.R.B., 549 F.2d 873 (2d Cir. 1977), enfg. 222 NLRB 1052 (1976); Zim's Foodliner, Inc. v. N.L.R.B., 495 F.2d 1131 (7th Cir. 1974), enfg. 201 NLRB 905 (1973). Cf. N.L.R.B. v. Band-Age, Inc., 534 F.2d 1 (1st Cir. 1976), enfg. 217 NLRB 449 (1975). The sale of the sundry department in the instant case is analogous to the sale of a single store which prior to the sale was part of a multistore bargaining unit. Such was the case in Zim's Foodliner where individual stores of a multistore bargaining unit were sold separately. The Board and the court found that the stores were operated at the same location, with the same physical plant and equipment, served the same products to the same customers, and the employees had the same job functions and immediate supervision as they had in the larger predecessor unit. Thus, it was determined that the fractionalized unit was an appropriate one.

In the instant case, there is no evidence in the record to contravene the contention of the General Counsel or the Charging Party that the Respondent sold the same type of products and provided the same kinds of services to the same spectrum of customers as did the predecessor prior to the transfer of the lease. Furthermore, the sundry department was operated in the same location—the Mission Street store—and was under the supervision of the same general manager who ran the department for the predecessor employer. Therefore, with the exception of the employee complement (which will be discussed infra) the "employing industry" remained identical to that which prevailed prior to the sale of the lease at the Mission store. In these circumstances, the contraction of the sundry department unit to the Mission store does not render it any less appropriate as a bargaining unit. Nazareth Regional High School, supra; Zim's Foodliner, supra. See also N.L.R.B. v. Foodway of El Paso, a Division of Kimbell Foods, Inc., 496 F.2d 117 (5th Cir. 1974).

The finding that the unit is appropriate leads to the more central question of whether the Respondent is a successor employer obligated under the circumstances here to hire the predecessor's employees and bargain with the Union. Under the Supreme Court's holding in Howard Johnson v. Detroit Joint Board, 13 and N.L.R.B v. Burns International Security Services, 14 a successor employer is not obligated to hire any of the work force employed by his predecessor. But, as pointed out in both decisions, a successor employer cannot refuse to hire the predecessor's "employees solely because they are union members or to avoid having to recognize the Union."15 Therefore, the central issue here is not whether the Respondent was obligated to hire the employees of his predecessor but, rather, whether the Respondent refused to hire these employees because they were members of Local 1100 and thereby avoid having to bargain with

In my judgment, the record warrants a finding that the Respondent unlawfully refused to hire those of the predecessor's employees who were available and willing to work at the Mission store after the transfer of ownership of the lease. The testimony of the former employees (Dominici, Edison, and Lopez) as well as that of Chu and McGrath graphically demonstrates that the employees became aware of the sale of the sundry department at least a month before its effective date. Further, upon gaining this knowledge, all of the employees were concerned over whether they could expect employment with the Respondent after the change in ownership of the lease. They engaged in repeated conversations about their job prospects with McGrath who, 3 weeks prior to the change in ownership, agreed to work in the same capacity as general manager for the Respondent. All three of the predecessors' employees testified they were told by McGrath they would be hired by the Respondent and that McGrath indicated that his assurances were based on his conversations with Chu. Contrary to this, McGrath testified that he told the employees on each occasion that he was apprised that the Respondent would

<sup>13</sup> Howard Johnson Co., Inc. v. Detroit Local Joint Executive Board, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, 417 U.S. 249 (1974).

<sup>&</sup>lt;sup>14</sup> N.L.R.B. v. Burns International Security Services, Inc., et al., 406 U.S. 272 (1972).

<sup>15</sup> Howard Johnson v. Detroit Joint Board, supra at 262, fn. 8; N.L.R.B. v. Burns International Security Services, supra at 280-281, fn. 5.

like to keep all of them but did not know which ones would be retained. He advised the employees to fill out new applications. Chu, on the other hand, stated he instructed McGrath to tell the employees, when questioned about future employment, that he did not know what the Respondent intended. This variance in the statements of Chu and McGrath casts serious doubts on the reliability of their testimony. Accordingly, I find the testimony of the employees to be more convincing and trustworthy.

The testimony also indicates that Dominici and Edison were not satisfied with McGrath's assurance and each went to Chu independently. Dominici stated that Chu told her he wanted to keep the employees, but was having problems between Local 648 and Local 1100. At this time Chu indicated he wanted the employees to be represented by Local 648. In this same vein, Edison testified that Chu told her that on May 30 he was having trouble with Local 1100 because he wanted to drop that union and get Local 648. Although Chu denied telling this to Dominici and Edison, I do not credit him. Their testimony regarding Chu's statements comports with the testimony of Cochran, Respondent's labor consultant. When first apprised by Chu that the Respondent intended buying Kurtz' lease at Mission, Cochran told Chu's attorney that the Respondent did not have to keep the employees but, if they were retained, the Respondent would have to pay the higher wage rates required by the collective-bargaining agreement with the Union. Cochran also stated he reminded Chu he might have jurisdictional problems between Locals 648 and 1100, even though he was aware at that time that none of Chu's pharmacy employees at any of the stores were represented by a union. 16 This unrefuted testimony by Cochran lends support to the statements of Dominici and Edison that Chu did not want Local 1100 representing his employees. Further, it warrants the inference that Chu was concerned by the higher wage rates he would have to pay if he hired the predecessor's employees, since they were members of Local 1100. It also serves to explain why Chu asked Edison if she would consider giving up her membership in Local 1100 and transferring to Local

In light of the above, I find that the credited testimony warrants the conclusion that the Respondent did not hire Dominici, Edison, or Lopez for the reasons that they were members of Local 1100. In making this finding, I rely on the assurances given the employees by McGrath that they would be hired by the Respondent only to the extent that it indicated the Respondent was considering employing these individuals until advised that it would be burdened with a union it did not want. <sup>17</sup> I find, there-

fore, that by refusing to hire these three employees because of their union affiliation, the Respondent violated Section 8(a)(3) and (1) of the Act. Karl Kallmann, d/b/a Love's Barbeque Restaurant, No. 62 v. N.L.R.B., 640 F.2d 1094, 1100 (9th Cir. 1981), enfg. in pertinent part 245 NLRB 78 (1979); Macomb Block and Supply, Inc., 223 NLRB 1285 (1976). 18

The finding that the Respondent refused to hire the three employees of its predecessor because of their union affiliation further warrants the inference that this action was taken in order to allow the Respondent to avoid any bargaining obligation, as a successor employer, with the Union. The record reveals that the Respondent brought in three employees, in addition to Chu's wife, from its other pharmacies to work in the sundry department at Mission. Thus, it becomes evident that, had the Respondent hired the three employees of its predecessor, the Union would have maintained its majority status in the unit and the Respondent, as the successor employer, would then have been under an obligation to recognize and bargain with the Union. N.L.R.B. v. Burns International Security Services, Inc., supra. Therefore, the Respondent cannot now be permitted to evade its legal obligations through its own wrongdoing in refusing to hire its predecessor's employees. Karl Kallmann v. N.L.R.B., supra at 1100-01; N.L.R.B. v. Foodway of El Paso, supra. Accordingly, I find the Respondent has also committed a violation of Section 8(a)(5) of the Act. J. R. Sousa & Sons, Inc., 210 NLRB 982 (1974). See also K. B. & J. Young's Super Markets, Inc. v. N.L.R.B., 377 F.2d 463 (9th Cir. 1967).

## CONCLUSIONS OF LAW

- 1. The Respondent, Ah Chu Company, is an employer within the meaning of Section 2(2) of the Act engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
- 2. Department Store Employees Union, Local 1100, affiliated with United Food and Commercial Workers Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

moved herself from consideration for hire by the Respondent. Gwing Hung opted to transfer to the Geary Street store and thereby removed himself from consideration for employment after the transfer of the lease.

<sup>&</sup>lt;sup>16</sup> Moreover, Cochran testified he was aware that Locals 648 and 1100 represented separate units of pharmacy and sundry department employees even when these units were in the same discount store location.

<sup>17</sup> Counsel for the General Counsel and the Charging Party contend that the other employees of the predecessor were also victims of an unlawful refusal to hire. I reject this contention as being unsupported in the record. McGrath testified that Sexton was on disability at the time of the sale of the lease and there is no indication in the record that she would have been considered for hire by the Respondent. McGrath also testified that Gilbert stated she did not wish to transfer to the Geary store and that she wanted to go on retirement or layoff. Thus, she voluntarily re-

Although these three individuals were alleged in the complaint to be discriminates, they were not available at the hearing. Counsel for the General Counsel and the Charging Party asserted they were not aware that the Respondent would defend on the ground that these individuals were not available for employment after the transfer of the lease. A brief recess was taken to afford counsel an opportunity to secure these witnesses but they were not found. Counsel for the Charging Party made offers of proof regarding testimony they would have given. The offers of proof were rejected since the complaint and notice of hearing setting the hearing date had been issued some 5 months previously, and there was no showing as to good cause—other than the claimed surprise—why these witnesses were not available.

<sup>&</sup>lt;sup>18</sup> Respondent contends that none of the employees filed an application for employment as requested and, thus, there was no refusal to hire them. This argument is without merit since Chu's conversations with Dominici and Edison made it clear to the employees that their union affiliation was an impediment to consideration for hire. Therefore, the failure of the employees to undertake a useless act is no defense to the unlawful refusal to hire. Maccomb Block and Supply, Inc., supra.

3. The following constitutes a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All employees performing selling and non-selling work in the sundry department operated by Respondent at 2558 Mission Street, San Francisco, California; excluding all other employees, guards and supervisors as defined in the Act.

- 4. By refusing to retain or hire three sundry department employees of Giant Value, after purchasing the lease for and operating that department at the Mission Street store, because they were members of the Union, the Respondent has discriminated against these employees with regard to hire and tenure of employment in violation of Section 8(a)(3) and (1) of the Act.
- 5. By unlawfully refusing to retain or hire the three sundry department employees of Giant Value because of their union affiliation, the Respondent has evaded its obligation, as successor to Giant Value, to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.
- 6. The above conduct constitutes unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

## THE REMEDY

Having found that the Respondent has committed unfair labor practices within the meaning of Section 8(a)(3), (5), and (1) of the Act, it shall be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Since the Respondent has unlawfully evaded its obligation, as successor to Giant Value, to bargain with the Union as exclusive representative of its employees in an appropriate unit, it shall be ordered to bargain in good faith, upon request, with the Union and embody in a signed agreement any understanding reached. The Respondent shall be further ordered to offer immediate employment to Alice Dominici, Lucilla Edison, and Susanna Lopez in the same positions they held when the Respondent purchased the lease for the sundry department at the Mission Street store from Giant Value or, if those positions no longer exist, in substantially equivalent positions, without prejudice to their seniority or other rights and privileges, dismissing, if necessary, all employees hired since Respondent took over operation of the sundry department. In addition, the Respondent shall make whole these three employees for any loss of pay they may have suffered by reason of the discrimination against them by paying each a sum of money equal to that which she would have normally earned as wages from the date of discrimination to the date of employment, less net earnings during such period. Interest on said wages shall be computed in the manner prescribed in F. W. Woolworth Company, 90 NLRB 289 (1950), and Florida Steel Corporation, 231 NLRB 651 (1977). 19

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

## ORDER 20

The Respondent, Ah Chu Company, San Francisco, California, its officers, agents, successors, and assigns, shall:

- 1. Cease and desist from:
- (a) Discouraging membership in Department Store Employees Union, Local 1100, affiliated with United Food and Commercial Workers Union, AFL-CIO, or any other labor organization, by refusing to hire employees who are members of that union, or any other labor organization, thereby discriminating against employees or applicants for employment in regard to hire and tenure of employment.
- (b) Refusing to recognize and bargain collectively regarding rates of pay, wages, hours, and other terms and conditions of employment with the above-named union as the exclusive bargaining representative of its employees in the following appropriate unit:

All employees performing selling and non-selling work in the sundry department operated by Respondent at 2558 Mission Street, San Francisco, California; excluding all other employees, guards and supervisors as defined in the Act.

- (c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act.
- 2. Take the following affirmative action designed to effectuate the policies of the Act:
- (a) Offer to Alice Dominici, Lucilla Edison, and Susanna Lopez immediate and full employment, without prejudice to their seniority or other rights and privileges, discharging if necessary any employees hired since the Respondent took over operation of the sundry department at the Mission Street store, and make them whole for any loss of pay they may have suffered by reason of the discrimination against them in the manner set forth in this Decision entitled "The Remedy."
- (b) Recognize and, upon request, bargain in good faith with Local 1100 as the exclusive representative of its employees in the appropriate bargaining unit set forth above with respect to rates of pay, wages, hours, and other terms and conditions of employment. In the event an understanding is reached, embody the terms of said understanding in a signed agreement.
- (c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other re-

<sup>&</sup>lt;sup>19</sup> See, generally, Isis Plumbing & Heating Co., 138 NLRB 716 (1962).

<sup>&</sup>lt;sup>20</sup> In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

cords necessary to analyze the amount of backpay due under the terms of this recommended Order.

(d) Post in the sundry department at the Mission Street, San Francisco, California, store, copies of the attached notice marked "Appendix." Copies of said notice, on forms provided by the Regional Director for

Region 20, after being duly signed by Respondent's authorized representative, shall be posted immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter, in places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 20, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

<sup>&</sup>lt;sup>21</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Board."